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Supreme Court, U.S.
FILED
JUL 15 2002
OFFICE OF THE CLERK

No. 01-1790

IN THE

# Supreme Court of the United States

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY, LOCAL 38,

*Petitioner,*

*v.*

HUBER, HUNT & NICHOLS, INC.,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## REPLY BRIEF

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This brief constitutes Petitioner United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry, Local 38's ("Local 38") reply to Respondent Huber, Hunt & Nichols, Inc.'s ("Huber") Brief in Opposition to Petition for Writ of Certiorari (the "Opposition Brief"). Local 38 filed its Petition for Writ of Certiorari (the "Petition") on June 4, 2002 to review the Opinion of the United States Court of Appeals for the Ninth Circuit in this proceeding.

## I.

## ARGUMENT

### A. HUBER'S OPPOSITION BRIEF FAILS TO ADDRESS OR REBUT THE ARGUMENTS MADE IN SUPPORT OF LOCAL 38's PETITION.

Local 38's Petition presented the following question for review:

> Whether the parties to a project labor agreement gave the arbitrator the authority to determine whether he can resolve disputes over arbitrability or whether that issue is properly left for judicial determination.

The Petition states that this Court should grant Local 38's petition for the following reasons:

- The Ninth Circuit's holding that the Project Stabilization Agreement's ("PSA") "broad arbitration clause" gave the PSA Arbitrator authority to determine the threshold question of arbitrability directly conflicts with this Court's holdings in *AT&T*

*Technologies, Inc. v. Communications Workers*, 475 U.S. 643 (1986), and prior precedent. The *AT&T Technologies* Court concluded that an arbitration clause similar to that in the present case required the court, rather than the arbitrator, to decide arbitrability. *Id.* at 651.

- The Ninth Circuit's holding here that the arbitrator, not the court, decides arbitrability conflicts with the decisions of other Circuit Courts of Appeals which have considered cases in which the question was whether the nature of the dispute was jurisdictional or contractual.

- The Petition presents a question of national importance because the Ninth Circuit's decision destabilizes the balance between arbitrability and review of arbitration awards.

Rather than squarely addressing any of these arguments, Huber's Opposition Brief obfuscates the Question Presented for Review by more than doubling its length and rehashes the arguments it made before the Ninth Circuit without responding to the arguments offered for the Court to grant the Petition. Boiled down, Huber's version of the Question Presented is as follows:

> [W]hether the Court of Appeals correctly determined that provisions of a project labor agreement . . . allocated to the project labor agreement arbitrator the authority to determine whether a claim . . . was a jurisdictional claim . . .

Using different words, Huber and Local 38 present the Court with essentially the same question: did the PSA "clearly and

unmistakably" grant the PSA Arbitrator authority to determine his own jurisdiction? *AT&T Technologies*, 475 U.S. at 649. Unfortunately, Huber declines to address this question in its Opposition Brief.

Instead, Huber focuses almost exclusively on whether the underlying dispute was a "jurisdictional dispute" to be handled under the PSA's procedures or a subcontracting dispute to be resolved under the incorporated collective bargaining agreement between Local 38 and Huber (the "CBA"). Huber presents various NLRB and Circuit Court cases in support of its argument that the underlying dispute was jurisdictional. However, whether Local 38's grievance was a "jurisdictional dispute" is irrelevant both to the Ninth Circuit's decision and to the arguments which support granting the Petition, because the Ninth Circuit expressly "decline[d] to label the underlying dispute here as either a jurisdictional or a contractual dispute." Petition, App. A, p. 8a. Instead, the Ninth Circuit "examine[d] whether the overall dispute is *arbitrable*." [Emphasis added.] *Id.* Because the Ninth Circuit's opinion addresses the question of arbitrability rather than the nature of the underlying dispute, Huber's arguments concerning the nature of the dispute are irrelevant to the merits of Local 38's Petition.[1]

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1. It is worth noting here that the District Court, the only forum benefitting from the full participation and briefing of both parties regarding whether the underlying dispute was jurisdictional or contractual, concluded that Local 38's grievance was *not* a jurisdictional dispute. See Petition, App. B.

## B. HUBER'S ASSERTIONS OF FACT AND LAW FAIL TO UNDERMINE THE ARGUMENTS IN SUPPORT OF LOCAL 38's PETITION.

Huber's Opposition Brief seeks to undermine the Petition by mischaracterizing or misstating the facts of the case and the substantive law. The most significant factual error appears in the Opposition Brief's Statement of Facts. Huber asserts, "As the Ninth Circuit unanimously found, the District Court erroneously concluded that the grievance filed by Local 38 constituted a contractual claim rather than a jurisdictional claim." Opp. Brief, p. 5-6.

The Ninth Circuit actually concluded that the District Court's arbitrability inquiry contained the "fundamental fallacy" that it, rather than the arbitrator, should decide whether or not the work assignment dispute is a "jurisdictional dispute." Petition, App. A, p. 7a. It did *not* conclude that the District Court decided (erroneously or otherwise) whether the underlying dispute was "contractual" rather than "jurisdictional." Instead, the Ninth Circuit faulted the District Court for failing to inquire whether the PSA Arbitrator had "the power to decide the arbitrability question himself." *Id.* Misreading the decision as it does, Huber fails to address the reasons supporting Local 38's Petition.

Huber's utterly unsubstantiated assertions that the Local 38 Arbitration Committee is a "kangaroo court" (Opp. Brief, pp. 7, 10) are also irrelevant to the Court's consideration of the Petition. Huber made a voluntary decision to be bound by the terms of the CBA, including its grievance procedure and arbitration committee: under the express terms of Section 6.4 of the PSA, Huber agreed to submit any dispute, except jurisdictional disputes, concerning application or

interpretation of the CBA to the CBA's grievance procedure. Because it entered into these obligations voluntarily, Huber is not entitled to escape its commitments by deciding, when convenient, that it does not like the procedures to which it has contractually agreed.

Another significant mischaracterization contained in the Opposition Brief is that the "*whole purpose* of a project-wide labor agreement is to assure speedy and final resolution of disputes, and avoid the expensive and time-consuming procedures of the NLRB and the courts." [Emphasis in original.] Opp. Brief, p. 10. While speedy and final resolution of certain disputes is an important benefit gained through a project labor agreement, it is hardly the *only* reason for such agreements. By its terms the PSA offers numerous other benefits to the adopting parties including Union Security, No Strike-No Lockout, Joint Labor-Management Meetings, and Affirmative Action as Required by Local Law provisions. See Lodging Ex. 1; Petition, p. 5. Further, this Court has recognized the additional benefits to be obtained by entering into a project labor agreement, including cost certainty for contractors and a reliable supply of readily available skilled craftsmen. *Building & Constr. Trades Council v. Associated Builders & Contractors (Boston Harbor)*, 507 U.S. 218, 231 (1993); *Jim McNeff, Inc. v. Todd*, 461 U.S. 260, 266 (1983).[2]

2. Huber also cites cases which do not support the propositions for which they are asserted. For example, the Opposition Brief states, "the dispute was *not of Huber's making* as Huber neither assigned the disputed work to the three competing unions nor had any interest in which of the competing unions should perform the work," [Emphasis in original.] Opp. Brief, pp. 13-14, citing *ILWU, Local 62-B v. NLRB*, 781 F.2d 919, 924 (D.C. Cir. 1986) as support for this proposition. However, the cited case does not stand for the proposition that a dispute will be considered "not of the employer's making" if (Cont'd)

## C. HUBER FAILS TO MEND THE SPLIT BETWEEN THE SEVENTH AND THE NINTH CIRCUITS REGARDING WHETHER A COURT OR AN ARBITRATOR DECIDES IF A DISPUTE IS JURISDICTIONAL OR CONTRACTUAL.

Huber claims that the Seventh Circuit's *Hutter* and *Miron* decisions cited in Local 38's Petition are "factually inapposite from the present case" and "have nothing whatsoever to do with the issue involved in this case." Opp. Brief, pp. 9, 8. While neither case involved a project labor agreement, both cases nevertheless stand for the proposition that when the parties disagree whether the underlying dispute is jurisdictional or contractual, the nature of the underlying dispute is an issue for judicial, rather than arbitral, determination. *Hutter Constr. Co. v. Operating Engineers*, 862 F.2d 641, 644 (7th Cir. 1988); *Miron Constr. Co. v. Operating Engineers*, 44 F.3d 558, 562 (7th Cir. 1995).

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(Cont'd)

the employer neither directly assigned the work in question nor cared who performed the work. In fact, Local 38's grievance was very clearly of Huber's making because Huber voluntarily elected to subcontract Local 38's work under the CBA to a nonsignatory subcontractor in violation of Article I, § 3(b) and Article II, § 12 of the CBA. Lodging Ex. 2, pp. L-34, L-40; *see also* PSA § 3.1, Lodging Ex. 1, p. L-7. *See also Hutter*, 862 F.2d at 645, n.15,

> In its brief, Hutter argues that it had no control over the circumstances that caused the breach. We find no merit to this contention. The "circumstances" that created the breach was Hutter's decision to subcontract the masonry work to BDI, not BDI's assignment to the Laborers, as Hutter claims. Hutter had complete control over the decision to subcontract the work to BDI.

As such, *Hutter* and *Miron* directly conflict with the Ninth Circuit's approach to the determination of arbitrability here.[3]

## D. THE REST OF HUBER'S OPPOSITION BRIEF IS NON-RESPONSIVE TO THE ARGUMENTS PRESENTED IN LOCAL 38's PETITION.

The remainder of the Opposition Brief is a long repetition of the arguments Huber made in its final brief presented to the Ninth Circuit. Specifically, Huber restates the PSA Arbitrator's decision, argues that the PSA Arbitrator's decision accords with several cases decided by the D.C. Circuit and the Ninth Circuit regarding the definition of a "jurisdictional dispute," elaborates on the PSA's procedures for resolving jurisdictional disputes, and argues NLRB case law for the proposition that the underlying dispute here was jurisdictional. None of these arguments regarding the nature of the underlying dispute in any way vitiate the reasons presented by Local 38 for the Court to grant its Petition. Therefore, Local 38 concludes that a point-by-point refutation of Huber's arguments is unnecessary.[4]

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3. Huber also makes much of the fact that the employer in *Hutter* was signatory to only a "*single collective bargaining agreement.*" [Emphasis in original.] Opp. Brief, p. 8. This statement is simply incorrect; in fact, both *Hutter* and *Miron* involve circumstances where the employer had entered into conflicting collective bargaining agreements with two different unions. *See Hutter*, 862 F.2d at 642, n.2 ("Hutter was also a party to a similar collective bargaining agreement with the Laborers. The practice of entering into conflicting collective bargaining agreements is very common in the construction industry."); *Miron*, 44 F.3d at 560-561.

4. While, as noted above, Huber's repetition of its arguments to the Ninth Circuit are non-responsive to the issues raised in the (Cont'd)

Instead, Huber's emphasis on the fact that the underlying dispute arose in circumstances where the parties had entered into both a project labor agreement and a collective bargaining agreement reinforces the importance of the issues presented in the Petition. Because the Court has not previously considered the interrelationship between the grievance procedures of a project labor agreement and a collective bargaining agreement when a dispute arises and because project labor agreements are used on large construction projects throughout the county, the Petition presents the Court with both a question of first impression and a question of national importance.

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(Cont'd)
Petition, the Opposition Brief contains a very misleading discussion of the controlling NLRB authority. Huber mischaracterizes *Capitol Drilling Supplies*, 318 NLRB 809 (1995), as a "controversial 3-2 opinion" "which overruled twenty years of Board law." Opp. Brief, p. 6. In fact, the Board has long recognized that subcontracting disputes are analytically distinct from jurisdictional disputes. *See Carpenters Local 33 (AGC of Massachusetts)*, 289 NLRB 1482 (1988) (held that Board's decision to award work performed by subcontractor to one union in § 10(k) jurisdictional dispute hearing did not preclude the losing union from pursuing its contractual remedies via arbitration against the general contractor).

## CONCLUSION

For reasons stated in the Petition and in this Reply Brief, Local 38's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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